United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B
P1S.

75-1045

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1045

UNITED STATES OF AMERICA,
Appellee,

—v.—

VICTOR PANICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

2

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1045

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR PANICA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Panica appeals from an order filed November 25, 1974, in the United States District Court for the Southern District of New York by the Honorable Lee P. Gagliardi, United States District Judge, denying without a hearing Panica's motion (1) for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and (2) to vacate his conviction pursuant to Title 28, United States Code, Section 2255.

Indictment 72 Cr. 313, filed March 17, 1972, charged Victor Panica, the appellant, Albert Pierro, Nicholas Christophe and Frank DeSimone with possession of 39.8 pounds of heroin with intent to distribute and with conspiracy to do so in violation of Title 21, United States Code, Sections 812, 841 and 846. Panica was convicted on May 2, 1972 on both counts; DeSimone was acquitted by the Court at

that trial at the end of the Government's case. Pierro and Christophe were thereafter tried together without a jury and both were found guilty.* On June 20, 1972, Panica, Pierro and Christophe were sentenced. Panica was sentenced to a jail term of 20 years.

All three convictions were affirmed by this Court, *United States* v. *Christophe,* 470 F.2d 865 (2d Cir.) and the Supreme Court denied *certiorari,* 411 U.S. 964 (1972).

On March 25, 1974 Panica filed a motion (1) for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the basis of newly discovered evidence and (2) to vacate his conviction pursuant to Title 28, United States Code, Section 2255. On November 25, 1974, Judge Gagliardi denied the motion, holding that the affidavits submitted by Panica were not sufficient to warrant relief because they did not qualify as proper evidentiary material to support either motion. On January 21, 1975 Panica filed a notice of appeal from Judge Gagliardi's order.

The Facts**

The claim underlying Panica's motion below was that Panica's co-defendant, Christophe, had been coerced into refusing to give testimony exculpatory of Panica at trial by threats of additional prosecution and by promises made by the Assistant United States Attorney.

The sole evidentiary support for Panica's motion was originally the affidavit of Panica's new attorney, Marvin Preminger, Esq. (A. 10-13).*** Attached to the affidavit of

---

* Pierro had pleaded guilty on April 26, 1972, but had been permitted to withdraw his plea.

** The facts proved at trial are set forth in this Court's opinion, *United States* v. *Christophe,* 470 F.2d 865 (2d Cir.), *cert. denied,* 411 U.S. 964 (1972).

*** References in parenthesis to "A" are to pages of Panica's appendix; references to "Br." are to pages of Panica's brief.

Mr. Preminger is a handwritten unsworn statement by an unidentified person, allegedly a guard at the Federal Detention Headquarters in New York, where Christophe and Panica were detained before and after trial (A. 14-16). This unsworn statement purports to report a conversation that the unidentified person had with Christophe.*

The attorney's affidavit also stated:

> "Our investigation also shows that Mr. Christophe has become a federal informant. He has been, to the best of our knowledge, aiding the FBI in furnishing them with information" (A. 12).

This led the attorney to the "inescapable conclusion that Mr. Christophe was a federal informant at the time this case was tried" and that Panica's "constitutional rights were further violated. . . ."

In response to the Government's answering affidavits, Panica's lawyer submitted a second affidavit. Although the

---

* The statement alleges, in pertinent part, as follows:

> One particular time, I noticed he [Christophe] was standing by the sink, no one else was there and he was crying. I asked him "What's the matter, are you alright?" I was wondering if he was sick or what it was that was bothering him. He seemed confused and upset. He said to watch Victor Panica, he was worried about him, that he was afraid of Panica. I knew who Panica was I used to see them together. Then he told me that he did a bad thing, that if he had testified at the trial at (sic) Panica, Panica would not be in jail today. Then, he said not to say anything to anybody else, it's a secret. When I asked him why he did not take the witness stand to clear Panica, he said the U.S. Attorney had told him that if he took the witness stand to clear Panica, he, the U.S. Attorney would prosecute him for Bank Robberies. That's what he said and that's why I am saying it. He insisted that the U.S. Attorney would not let him tell the truth to clear Panica (A. 15).

Government called attention to the fact that the statement of the unidentified alleged jail guard was unsworn and hearsay (A. 25), no sworn statement of the guard was submitted, and he remains unidentified. Appended to the lawyer's second affidavit, however, was the affidavit of the co-defendant Albert Pierro (A. 33-34). Although this affidavit had been executed prior to the filing of the original motion, it was not filed until after the Government's response (A. 34 and 13). In pertinent part, it read as follows.

> 4. That in the early part of April, 1972, I overheard Nicholas Christopher, tell Victor Panica that he should not worry about being on the indictment because when the proper time arrived he (Nicholas Christopher) would take the witness stand and exonerate Victor Panica from any guilt because he, Panica, had nothing to do with this case and was merely an unfortunate innocent bystander.
>
> 5. That shortly thereafter Nicholas Christopher told me personally outside of Panica's hearing range, that he (Christopher) would do anything Mr. Higgins, Assistant United States Attorney for the Southern District of New York, told him to do as long as Mr. Higgins promised him that he would be allowed to visit his sick daughter (A. 33-34) (spelling in original).

By order with opinion filed November 25, 1974, Judge Gagliardi denied Panica's motion, holding that on account of their hearsay nature "the affidavits submitted by Panica are not sufficient to warrant relief because they do not qualify as proper evidentiary material to support a petition under § 2255, *D'Ercole* v. *United States*, 361 F.2d 211 (2d Cir. 1966), *cert. denied*, 385 U.S. 995 (1966)" (A. 35-37). The trial judge also noted that the statements ascribed to Christophe by the unidentified guard were of no probative value because those purported statements merely reflected Christophe's conclusory evaluation of the unspecified testimony he might have given (A. 37).

ARGUMENT

The District Court properly denied Panica's motion without a hearing.

On appeal, Panica claims that the trial judge failed to comply with 28 U.S.C. § 2255 because he denied Panica's motion without having an evidentiary hearing. This contention is entirely without merit.*

---

* While proceeding to the merits of Panica's claim on appeal, we believe it appropriate to note that there is grave doubt that this Court has jurisdiction of this appeal. Panica's motion below sought relief under both Rule 33 of the Federal Rules of Criminal Procedure and Title 28, United States Code, Section 2255 (A. 8), but it was captioned and filed only in the criminal action in which Panica had been convicted. While procedurally this was appropriate insofar as Panica's application was made under Rule 33 of the Federal Rules of Criminal Procedure, it was entirely defective insofar as Panica purported to proceed under 28 U.S.C. § 2255, which, as a device to attack a conviction collaterally, is invoked under settled practice by the initiation of a separate civil proceeding. *United States* v. *Hayem*, 342 U.S. 205, 222 (1952); *Brown* v. *United States*, 480 F.2d 1036, 1039 (5th Cir. 1973); *Semet* v. *United States*, 422 F.2d 1269, 1271 (10th Cir. 1970); *Jenkins* v. *United States*, 325 F.2d 942 (3d Cir. 1963). *See also Andrews* v. *United States*, 373 U.S. 334, 338 (1963).

The Government made no complaint about this procedural irregularity below. However, since Panica elected to seek his relief entirely within the framework of the criminal action and commenced no separate civil proceeding for the relief he sought under Section 2255, his appeal should be controlled by Rule 4(b) of the Federal Rules of Appellate Procedure, which governs appeals in criminal cases. See *D'Allesandro* v. *United States*, Dkt. No. 74-2682 (2d Cir., May 1, 1975) slip op. 3400-3401. Having elected—improperly or not—to proceed exclusively in the criminal action against him, Panica was obliged under Rule 4(b) of the Federal Rules of Appellate Procedure to file his notice of appeal within ten days of Judge Gagliardi's order, which was filed November 25, 1974. Instead, Panica waited until January 21, 1975, to file his notice of appeal, which is thus out of time by some 45 days. Panica's failure to comply with F.R.A.P. 4(b) is jurisdic-

[Footnote continued on following page]

Judge Gagliardi grounded his ruling below on the deficiency of Panica's allegations in support of his motion.* His action was entirely justified, for neither relief nor a hearing is required under Section 2255 unless the affidavits submitted in support of the application offer proof sufficient to warrant relief in a form which would be admissible if a hearing were held. *Dalli* v. *United States*, 491 F.2d 758, 760 (2d Cir. 1974). Hearsay and conclusory statements are entirely inadequate. *Id.*

---

tional. *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Had Panica properly proceeded under 28 U.S.C. § 2255 by filing a separate civil action, his appeal would be timely, *Cf. Heflin* v. *United States*, 358 U.S. 415, 418 n. 7 (1959); *Holley* v. *Capps*, 468 F.2d 1366 (5th Cir. 1973), F.R.A.P. 4(a), 28 U.S.C. § 2255, but Panica filed no such civil action.

Furthermore, the notice of appeal is in any event defective because it recites that Panica appeals, not from Judge Gagliardi's order of November 25, 1974—of which the notice of appeal makes no mention—but rather, and only, that the appeal is taken "from the judgment of conviction, convicting him of the above charges rendered June 14, 1972 . . ." (A. 41).

* The claim that Judge Gagliardi's denial of the motion took account of factual material in the Government's responsive affidavits outside "the files and records of the case" (Br. at 4) is belied by even a superficial reading of his opinion (A. 37). Of course, to the extent that Panica purported to proceed under Rule 33 of the Federal Rules of Criminal Procedure, it would have been perfectly appropriate for Judge Gagliardi to consider the sworn denial by Assistant United States Attorney Walter J. Higgins, Jr., that he had never made any of the alleged threats (A. 29). *United States* v. *Johnson*, 327 U.S. 106 (1946); *United States* v. *Persico*, 339 F. Supp. 1077, 1083 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *United States* v. *Trudo*, 449 F.2d 649, 653-654 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). Indeed, it is by no means clear that it would have been improper for the Judge to do so to the extent that the motion was made under Section 2255. *Dalli* v. *United States*, *supra*, 491 F.2d at 762 n. 4. However, the fact remains that it was unnecessary for Judge Gagliardi to consider the affidavits submitted by the Government, and he did not do so.

Panica offered nothing more. The unsworn, handwritten statement reciting purported remarks of Christophe to an alleged unidentified guard at West Street is clearly of no evidentiary value whatever. The affidavit of the co-defendant Pierro similarly consists solely of hearsay likewise inadmissible proof at a hearing. This case is plainely governed by *D'Ercole* v. *United States, supra*, 361 F.2d at 212, relied on by Judge Gagliardi below. In *D'Ercole*, this Court said:

> In support of his allegation that the Government knowingly used perjured testimony to bring about his conviction, D'Ercole attached to his petition an affidavit made by another prisoner in which the affiant related conversations which he had with D'Ercole's co-defendant, John Cimino, in which Cimino allegedly admitted to the affiant that he, Cimino, had been coerced by federal agents to implicate D'Ercole and to testify against him, although the agents well knew that D'Ercole was innocent. If what Cimino is supposed to have said was in fact true, then of course, the appellant was denied due process under the Fifth Amendment to the Federal Constitution, and he would be entitled to relief under § 2255 and a new trial. The difficulty is that the affiant's statement of what John Cimino said does not qualify as proper evidential material to support a petition under § 2255 because it is hearsay and could not be used at a hearing. See *United States* v. *Pisciotta*, 199 F.2d 603, at 607 (2d Cir. 1952).

The record does not indicate that any effort was made by Panica, his attorney or their so-called investigator to speak to Christophe, who was in custody at the time of the proceedings below, or to have him produced.

In addition to being hearsay, Pierro's affidavit is conclusory and provides no facts whatsoever to support the conclusion that Christophe was actually threatened by the Assistant United States Attorney. It alleges merely that Christophe said he "would do anything that Mr. Higgins, Assistant United States Attorney for the Southern District of New York, told him to do as long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." A hearing is required only where detailed evidentiary facts are alleged. *Michel* v. *United States*, 507 F.2d 461, 464 (2d Cir. 1974); *Dalli* v. *United States*, *supra*, 491 F.2d at 760; *O'Neal* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1973); *United States* v. *Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971).*

Moreover, although the Court below found it unnecessary to reach this ground, the record of the pretrial proceedings and the trial in this case establish that Panica's application below was nothing more than the continuation of a rather doubtful strategy, which proved unsuccessful at trial. Before trial, Panica moved to sever his trial from that of his co-defendants, DeSimone, Pierro and Christophe, for the ostensible reason, stated in the affidavit of Gino Gallina, Panica's counsel, that DeSimone and Christophe had both allegedly agreed to testify and exculpate Panica at a separate trial (A. 18-22). While Pierro had not then apparently been heard from, he now has been, in an affidavit in support of the motion below, in which he swears to Panica's innocence (A. 33-34). Panica's pretrial motion to sever was denied. However, by the time the Government had concluded its direct case at Panica's trial, both DeSimone and Pierro were available to be called in Panica's

---

* Similar considerations dispose of the unsupported surmise, made in defense counsel's affidavit below but not raised on appeal, that Christophe is now a government informant, that he therefore may have been one at the time of the trial of this case, and that, if so, this constituted improper governmental interference with the defense.

defense, the former having been acquitted and the latter having pleaded guilty. Perhaps not suprisingly, despite Panica's pretrial motion to sever so that DeSimone could testify for him, Panica did not call DeSimone; nor did he call Pierro (A. 26). The only co-defendant he sought to call was Christophe, whose guilt or innocence on the indictment had not yet been determined. Again not surprisingly, Chrishtophe asserted his Fifth Amendment privilege (A. 26).

Viewed in this light, Panica's claim of "newly discovered" lamentations by Christophe that he was threatened into silence by the United States Attorney are shown by the record to be utter fabrication. Despite the availability as defense witnesses at trial of two of his three co-defendants, one of whom, DeSimone, had allegedly previously agreed to give exculpatory testimony and had since been acquitted, Panica called neither and sought testimony from Christophe, the only one of his co-defendants whose jeopardy on the indictment was unresolved and who was apparently in no better position to exculpate Panica than DeSimone. Christophe declined to testify, not because of threats by the Government, as Panica now claims, but on the ground of his privilege against self-incrimination, an entirely reasonable explanation tendered at trial by Christophe's counsel and accepted by Panica's counsel without making Christophe assert the privilege from the witness stand (A. 23-24), a right* waived by Panica, who seems not to have been too interested then in having Christophe tell the jury the truth about what he was up to in the middle of the night with Panica, a previously convicted narcotics violator, fleeing the police at high speed in an automobile loaded with 40 pounds of heroin and $150,000 in cash. His present contentions are so "palpably false" that no hearing was warranted. *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974).

---

* *United States* v. *Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—214—502

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of May, 1975 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Messrs. Preminger, Meyer & Light
66 Court Street
Bfooklyn, New York 11201

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas M. Fortuin
THOMAS M. FORTUIN

Sworn to before me this
7th day of May 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977